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## THE CONSTITUTIONAL SOCIAL SECURITY RIGHTS IN LATVIA\*

### 1. The constitutional guarantees of social security rights

The Constitution of the Republic of Latvia<sup>1</sup> contains two articles explicitly providing social security rights. Article 109 provides: ‘*Everyone has the right to social security in old age, for work disability, for unemployment and in other cases as provided by law.*’ Article 111 stipulates: ‘*The State shall protect human health and guarantee a basic level of medical assistance for everyone.*’ However there are few more norms which are connected with the social security rights. Those are – Article 110 providing for the obligation of the state to protect marriage, family, rights of the parents and children, Article 105 providing the right to property and Article 91 providing the principle of equality.<sup>2</sup>

The social security guarantees like other human rights in Latvian Constitution “appeared” relatively recently. Only on 15 October 1998 the Constitution was amended by Chapter VIII Fundamental Human rights.<sup>3</sup> Previously the human rights of constitutional level were stipulated by the constitutional level laws and such system was recognized as inefficient and incompatible with the European standards.<sup>4</sup> Therefore human right provisions of the Constitution were elaborated taking into account impressive body of existing international human rights law by the end of 20<sup>th</sup> century.

The provisions of the Constitution providing for the social security right are laconic. Such style on 1998 was chosen intentionally to fit into old-style Latvian language and form of the original text of the Constitution adopted on 1922. However laconic wording of the social security rights has not led to their restrictive interpretation and application. Even opposite – the Constitutional Court of Republic of Latvia has adopted numerous decisions on social security rights.<sup>5</sup> It is worthy to mention that the precondition for the

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<sup>1</sup> Latvijas Republikas Satversme, adopted on 15 February 1922, entered into force on 7 November 1922; renewed Official Gazette No. 43, 1 July 1993, re-entered into force on 31 March 1994.

<sup>2</sup> Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, A.Kovalevska, 109.pants, pages 553–555.

<sup>3</sup> Official Gazette No. 308/312, 23 October 1998.

<sup>4</sup> Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, R.Balodis, Ievads, pages 14–15.

<sup>5</sup> All decisions of the Constitutional Court of Republic of Latvia in Latvian are available at: <http://www.satv.tiesa.gov.lv/?lang=1&mid=19>. Majority of the decisions are also available in English at: <http://www.satv.tiesa.gov.lv/?lang=2>.

existence and development of such a considerable case-law body in the field is the right to constitutional claim provided for any private person who considers him/herself as a victim of incompatibility of legal norms with the fundamental human rights stipulated by the Constitution.<sup>6</sup> The majority of the cases decided were originated from the constitutional claims of private persons.

## 2. The scope of the material and personal social security rights guaranteed by the Constitution

### *The material scope*

Regarding material scope of Article 109 the Constitutional court has stressed following: *‘It has been established in the case-law of the Constitutional Court that Article 109 of the Satversme [the Constitution] guarantees the inhabitants the right to a stable and predictable, as well as effective, fair and sustainable system of social protection that ensures a proportional social security.’*<sup>7</sup>

In its case-law the Constitutional court has interpreted the right to social security under Article 109 as entailing different social security measures including social insurance and other social security instruments.<sup>8</sup>

The majority of the cases decided by the Constitutional court regarding Article 109 concerns statutory social insurance – regarding contributions to statutory social insurance,<sup>9</sup> old-age<sup>10</sup> and disability<sup>11</sup> pensions, unemployment,<sup>12</sup> accident at work,<sup>13</sup> maternity<sup>14</sup> insurance and allowances.<sup>15</sup> However the Court has interpreted Article 109 as applicable also to other types of social security instruments, i.e., state funded old-age pensions,<sup>16</sup> long-term public service pensions<sup>17</sup> and flat-rate social subsistence allowance.<sup>18</sup>

<sup>6</sup> Satversmes tiesas likums (*The Law on the Constitutional Court*), Official Gazette No. 103, 14 June 1996, Article 19<sup>2</sup>.

<sup>7</sup> Decision in case No. 2010–17–01, paragraph 7.

<sup>8</sup> See also Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, A.Kovalevska, 109.pants, page 557.

<sup>9</sup> Decisions in cases No. 2000–08–0109, 13 March 2001; No. 2011–03–01, 19 December 2011; No. 2011–08–01, 25 January 2012.

<sup>10</sup> Decisions in cases No. 2001–02–0106, 26 June 2001; No. 2001–12–01, 19 March 2002; No. 2002–15–01, 23 December 2002; No. 2004–21–01, 6 April 2005; No. 2005–08–01, 11 November 2005; No. 2006–05–01; 8 November 2006; No. 2007–01–01, 8 June 2007; No. 2007–04–03, 9 October 2007; No. 2009–08–01, 26 November 2009; No. 2009–43–01, 21 December 2009; No. 2010–29–01, 18 February 2011; No. 2012–12–01, 13 February 2013.

<sup>11</sup> Decision in case No. 2012–09–01, 31 January 2013.

<sup>12</sup> Decision in case No. 2001–11–0106, 25 February 2002.

<sup>13</sup> Decisions in cases No. 2003–22–01, 26 March 2004; No. 2010–17–01, 29 October 2010.

<sup>14</sup> Decision in case No. 2003–19–0103, 14 January 2004.

<sup>15</sup> See also Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, A.Kovalevska, 109.pants, page 557.

<sup>16</sup> Decisions in cases No. 2010–21–01, 1 December 2010, No. 2011–08–01, 25 January 2012.

<sup>17</sup> Decisions in cases No. 2009–43–01, 21 December 2009; No. 2009–86–01, 21 April 2010; No. 2009–88–01, 15 April 2010; No. 2013–01–01, 8 November 2013.

<sup>18</sup> Decision in case No. 2011–20–01.

The social security rights regarding parenting and child-care allowances are reviewed by the Constitutional court under Article 110. It is considered that in the context of social security rights under Article 109 Article 110 is a special norm which is applicable in cases concerning the social and economic protection of a family.<sup>19</sup> It is also approved by the Constitutional court which has stated in one of the cases regarding child-care allowance that such right may be reviewed under both – Article 109 and Article 110.<sup>20</sup> The Constitutional court has decided cases on social insurance parental allowance<sup>21</sup> as well as non-contributory child-care social allowances<sup>22</sup> and allowance in case of a loss of breadwinner.<sup>23</sup> It follows from the case-law of the Constitutional court that Article 109 definitely covers statutory social insurance as well as statutory allowances.

The Constitutional court has not given exhaustive definition on the scope of Article 109, in particular, in which cases and what forms the social security must be provided. It may be explained by following considerations.

First, is the fact that Article 109 itself explicitly stipulates only obligation to provide social security in case of old-age, inability to work, unemployment and ‘*in other cases provided by law*’. It means that the Constitution itself leaves it for the legislator to choose the cases in which the persons must enjoy social security.

However it has stated to that regard:

*‘The system of social protection is aimed at eliminating consequences of such circumstances, which are the so-called social risks. Article 109 of the Satversme enumerates social risks: old age, the loss of ability to work, and unemployment. However, this is not an exhaustive list of risks. Article 109 of the Satversme commits the legislator to include other social risks into the social protection system. A part of risks that must be included into this system follow from fundamental rights of persons and duties of the State enshrined in other articles of the Satversme, for instance, health protection, provision of care to disabled persons, the rights of the child, family support. Other social risks must be included into the social security system based on the essence of the social rights, as well as international liabilities of Latvia. The Ombudsman indicates that the duty of the State to establish such social security system that would comprise “all traditional social risks” follow from Article 109 of the Satversme [...]’.*<sup>24</sup>

Second, Article 109 does not stipulate what is ‘social security’. The social security may be provided in many different forms, for example, in the form of social insurance allowances, non-contributory allowances (flat-rate, needs based) allowances, social services. Besides, social security may be provided not only by statutory schemes but also by private

<sup>19</sup> Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, A.Kovalevska, 109.pants, page 554.

<sup>20</sup> Decision in case No. 2006–10–03, 11 December 2006., paragraphs 12–14.

<sup>21</sup> Decisions in cases No. 2009–44–01, 15 March 2010

<sup>22</sup> Decision in cases No. 2006–07–01, 2 November 2006; No. 2006–08–01, 21 February 2007; No. 2006–10–03, 11 December 2006; No. 2007–13–03, 19 December 2007; No. 2007–15–01, 12 February 2008.

<sup>23</sup> Decision in case No. 2005–19–01.

<sup>24</sup> Decision in case No. 2010–17–01, paragraph 7.

schemes.<sup>25</sup> The Constitutional court has not yet ruled on two latter forms of social security instruments. However the Court has approved that Latvian social security system comprises not only social insurance but also social assistance. Both of them are mutually connected and supplement each other.<sup>26</sup> Nevertheless it is the legislator who has to define particular instruments, because in the field of social rights *'the State enjoys freedom of action when selecting methods and mechanism to apply when implementing these rights'*.<sup>27</sup> Besides:

*'Article 89 of the Satversme provides that "the State shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia". Consequently, in cases, when there is doubt about the contents of the human rights included in the Satversme, they should be interpreted in compliance with the practice of application of international norms of human rights'*<sup>28</sup>

It follows that the content of the concept of 'social security' and instrument provided to ensure it also largely depend on international obligations of Latvia.

In addition to abovementioned the Constitutional court has stated two important principles. First, with regard to social insurance that Article 109 does not entitle a person to the right to request compensation to unearned labour incomes if they are already compensated due to another risk,<sup>29</sup> and, second, that the rights of a person in a form of statutory social insurance may not be replaced by social assistance in case a person has been insured.<sup>30</sup>

According to the Constitutional court the material scope of Article 111 includes the state obligation to observe, protect and provide the rights of the person to the health. An obligation to observe – means that the state has an obligation not to intervene in the rights and freedoms of a person, i.e., to refrain from actions which might restrict the opportunities of a person to take a care of a health condition him/herself. An obligation to protect – means that the state has to protect a person from intervention of other persons in the realization of his/her fundamental rights. An obligation to provide the right to a health means that a state has to undertake particular actions to implement such fundamental rights.<sup>31</sup>

The Constitutional court has defined the obligations of the state under Article 111 by referring to the UNO International Covenant on Economic, Social and Cultural Rights in the Member States has interpreted the rights to health protection in its General Comment No. 14 "The right to the highest attainable standard of health".<sup>32</sup> It has cited that:

<sup>25</sup> Like occupational social security schemes organised by an employer or a private insurance company, widely spread in Western Europe (see, for example, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ L 204*, 26/07/2006, p. 23–36, Chapter 2 Equal treatment in occupational social security schemes). See also Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, A.Kovalevska, 109. pants, page 558.

<sup>26</sup> Decision in case No. 2000–08–0109, 13 March 2001.

<sup>27</sup> See decision in case No. 2009–08–01, 26 November 2009, paragraph 15.

<sup>28</sup> Decision in case No. 2011–03–01, 19 December 2011, paragraph 15.2.

<sup>29</sup> Decision in case No. 2010–17–01, paragraph 10.2.

<sup>30</sup> Decision in case No. 2000–08–0109, 13 March 2001.

<sup>31</sup> Decision in case 2012–14–03, 9 April 2013, paragraph 12.

<sup>32</sup> Decision in case No. 2008–37–03, 29 December 2008, paragraph 11.2.

*[...] the rights include the rights to availability of such medical assistance system that would ensure equal possibilities to reach the highest health level possible for everyone. It must be taken into consideration, however, that the State can not undertake full responsibility for the possibilities of a person to reach the highest health level possible if it is determined by genetic factors, resistance or non-resistance of a particular person against different diseases, as well as unhealthy life style. Consequently, the rights to health protection comply with the duty of the State to ensure availability and accessibility of medical care institutions, services, equipment and medical products, as well as other conditions that affect the possibility to reach the highest health level possible.*<sup>33</sup>

In addition to that the Constitutional court has reviewed under Article 111 the cases regarding imprisonment conditions, in particular, the food and hygienic norms. It has recognized that the state has also an obligation within the scope of Article 111 to ensure the equal access of all groups of the society to the factors facilitating good health, in particular, it includes the right to minimum and balanced nurture accessibility of imprisoned persons.<sup>34</sup>

As regards material scope of Article 105 providing for the right to property in the context of social security rights the Constitutional court has in general followed the case-law of the European Court of Human Rights (ECtHR) on Article 1 of the Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It has referred to the finding of the ECtHR<sup>35</sup> that statutory social security benefits in a modern democratic state should be reflected under Article 1 of the Protocol 1 of the ECHR. In addition to that the Constitutional court admitted the ECtHR that social security benefits fall under Article 105 irrespective of the source of the funding of such benefits.<sup>36</sup> Consequently it follows that although the discussed case concerned old-age pensions of statutory social security system which is based on contributions of the persons, Article 105 is applicable to the non-contributory social security benefits.<sup>37</sup> At the same time:

*[...] the Constitutional Court stated that the rights to receive pension disbursements are deemed as property rights in the understanding of Article 105 of the Constitution. However, when determining the compliance of a legal provision to the article in question, one has to take into account whether the case is related to the area of social rights. If the case is related to this area, it should at the same time be taken into account that the rights and legal interests of the submitter of the Application cannot be protected to the same extent as they would be protected in the case of restriction of property rights in their "classic" understanding [...].*<sup>38</sup>

<sup>33</sup> Decision in case No. 2009–12–03, paragraph 17.

<sup>34</sup> Decision in case No. 2009–69–03, 9 March 2010, paragraph 8

<sup>35</sup> *Stec and Others v. the United Kingdom* [GC], Nos. 65731/01 and 65900/01, 12 April 2006, paragraph 51.

<sup>36</sup> Decision in case No. 2007–01–01, 8 June 2007.

<sup>37</sup> Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, A.Kovalevska, 109.pants, page 554.

<sup>38</sup> Decision in case No. 2009–43–01, paragraph 20.

Article 91 which is widely discussed in case-law of the Constitution court in social security matters provides for the general principle of equality. The content of such principle is classical one – it prohibits different treatment of similar circumstances and similar treatment of substantially different situations.<sup>39</sup> With regard to application of the principle of equality in the field of social rights the court has stated following:

*‘The principle of equality usually applies along with other fundamental rights – especially because often one cannot adjudicate a case on the basis of this principle alone. The rights established in Article 91 of the Constitution are “relative”, namely, although they stipulate equal treatment, by themselves they do not reveal the nature of this treatment, i.e. whether it should be favourable or unfavourable. In order to arrive at one of these outcomes, one should take into account other considerations outside the limits of the principle of equality [...]’.*<sup>40</sup>

### *Personal scope*

Wording of Article 109 indicates that ‘everyone has the right to social security’ and Article 111 refers to ‘everyone’ with regard to the rights to basic level medical assistance.

However the laws put certain restrictions with regard to personal scope on the basis of the place residence and on the basis of nationality. The Constitutional court has delivered several decisions regarding such restrictions. One restriction has even been reviewed by the Grand Chamber of the ECtHR.<sup>41</sup>

The Constitutional court has held that restriction to receive statutory social insurance allowance in case of unemployment to those foreigners who have permanent residency permit does not comply with Article 109 as far as it concerns spouses of permanent residents of Latvia, because such spouses usually have an intention to stay in Latvia permanently however they may be entitled to permanent residency permit only after 5 years of residence. Such a restriction however complies with Article 109 with regard to other foreigners who do not have permanent residency permit, because other groups of foreigners in general do not have an intention to stay in Latvia permanently.<sup>42</sup> It is doubtful if such finding was correct, because, first, all employees in the territory of Latvia are subject to mandatory statutory social insurance irrespective of nationality and type of residence permit, second, UN Economic, social and cultural rights Committee commentary No. 19 indicates that contributory allowances in principle must be available to all persons, including foreign workers, third, permanent residency permit may be acquired only after 5 years residence which is comparably long term for the entitlement to the social rights.<sup>43</sup>

<sup>39</sup> Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, E.Levits, 91.pants, page 89.

<sup>40</sup> Decision in case No. 2009–43–01, paragraph 20.

<sup>41</sup> Andrejeva v. Latvia 18 February, 2009, application No. 55707/00.

<sup>42</sup> 2001–11–0106, 25 February 2002.

<sup>43</sup> Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības, Latvijas Vēstnesis, Rīga, 2011, A.Kovalevska, 109.pants, page 560.; referring to European Committee of Social Rights. Conclusions XiX–2, 2009, Latvia.



In case concerning flat-rate non-contributory breadwinner loss allowance for a minor descendent was contested the restriction providing that a deceased person have had resided in Latvia at least 60 months including the last 12 months continuously.<sup>44</sup> The claimant was a minor – Latvian citizen and the deceased person was his father also Latvian citizen who had worked and permanently resided in Russia for many years and has passed away there. The Constitutional court found that the case, first, concerns the rights of a child, because breadwinner loss allowance is intended for minor children thus the case must be reviewed under Article 110. It found that there is no reasonable ground for granting such an allowance on the basis of a place of residence of a deceased parent, because the beneficiary is child, besides it is non-contributory allowance where social security contributions and length of service requirements are irrelevant. Further it found that even though the contested norm has a legitimate aim, the measures chosen do not correspond to the best interest of a child and that there is no justification for differential treatment of the children living in Latvia with regard to the entitlement to the breadwinner loss non-contributory allowance on account of the place of residence of a deceased parent.

However the most notable decisions with regard to personal scope of the constitutional social rights concerns ‘tricky’ status of ‘Latvia non-citizen’ and periods of employment taken into account for the calculation of the old-age pension. In particular, according to the Law on State Pensions the periods of employment during Soviet occupation completed outside territory of Latvia are not taken into account for the purposes of the calculation of old-age pension. Such restriction applies to Latvian non-citizens while it does not apply to Latvian citizens.

First regarding status ‘Latvia non-citizen’ – unknown concept under public international law but existing under Latvian law as a consequence of Soviet occupation. The Constitutional court has explained the reasons of the existence of such status in a following way:

*‘After reinstatement of independence, the legislator had to decide on establishing the body of Latvian citizens. Taking into consideration continuity of Latvia as an international legal subject, there was reason for renewing the aggregate body of Latvia in the same way as it was determined in 1919 “Law on Citizenship”. Thus, Latvia did not grant citizenship to persons, who had it before occupation of Latvia, but renewed the right of these persons de facto [...]. Consequently, continuity of Latvia as an entity subject to international law gave legal groups for granting the status of citizens to certain group of person, and it was necessary to grant a special legal status to those persons who travelled to Latvia during the occupation period without obtaining any other citizenship.’<sup>45</sup>*

Further the court has stressed that Latvian non-citizens has legal ties with Latvia and there exist mutual rights and duties, however it may not be considered as variety of Latvian citizenship and *‘the context of State continuity is the determining factor and serves*

<sup>44</sup> Decision in case No. 2005–19–01, 25 December 2005.

<sup>45</sup> Decision in case No. 2010–20–0106, paragraph 13, by referring to Ziemele I. Starptautiskās tiesības un cilvēktiesības Latvijā: abstrakcija vai realitāte. – Rīga: Tiesu namu aģentūra, 2005, pp. 103.

as a crucial aspect to regard differences in the procedure for calculating pensions of citizens and non-citizens as grounded'.<sup>46</sup>

According to this the Constitutional court on 26 June 2001 in case No. 2001–02–0106 found that Latvia under public international law may not be responsible for the payout of old-age pensions to Latvian non-citizens for the periods of employment completed outside territory of Latvia for period until 1 January 1991. Consequently such a restriction complies with Articles 89, 91 and 109 of the Constitution and it also complies with Article 14 of European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the 1 Protocol of the Convention.

The restriction was also contested before the ECtHR.<sup>47</sup> The ECtHR reviewed the case in Grand Chamber and found that there has been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol 1. Even though under factual circumstances the dispute was about the situation in which periods of employment factually carried out in the territory of Latvia but formally at Kiev, Ukraine where particular State range enterprise had a head office, the ECtHR did not take into account the details and ruled that in principle such different approach towards periods taken into account for the purposes of the calculation of the old-age pensions for Latvian citizens and non-citizens is contrary to the ECHR. Such treatment constitutes unjustified discrimination on the grounds of nationality. The decision was analysed in detail from the perspective of public international law in partly dissenting opinion of judge Ziemele.<sup>48</sup>

Latvia did not implement the ECtHR judgement in its broader sense. It simply took into account employment periods of Ms. Andrejeva factually performed in Latvia and managed to conclude bilateral international agreements with numerous ex-Soviet republics on mutual recognition of employment periods for the purposes of social insurance. The most important, i.e., affecting considerable part of the population of Latvia, was agreement concluded with Russian Federation on 19 February 2011.

Such an approach, namely, that Latvia is not under obligation to provide old-age pensions for the periods of employment carried out outside Latvia by Latvian non-citizens unless otherwise provided by bilateral international agreement was once again re-approved by the Constitutional court on 17 February 2001 by decision in case No. 2010–20–0106 where the court stated that ECtHR decision in case *Andrejeva vs Latvia* concerned only factual circumstances of the particular claimant, namely, periods of employment factually completed in Latvia. Consequently it does not follow from such a decision of the ECtHR and also from the public international law that Latvia has an obligation to provide old-age pensions to Latvian citizens and non-citizens on the same conditions.

<sup>46</sup> Decision in case No. 2010–20–0106, paragraph 13.

<sup>47</sup> *Andrejeva vs. Latvia*, 18 February, 2009, application No. 55707/00.

<sup>48</sup> A judge from Latvia.



### 3. The Constitutional regulations' impact on the content of social security rights in the domestic legal system

In general the impact of the constitutional regulation in the field of social security thanks to the Constitution court is considerable. The fact is that the constitutionality of social security rights provided by lower range normative acts have been contested very frequently in comparison to other fundamental rights. It may be explained by the fact that social security rights affect the greatest part of the population and that they 'comes into play' of the life of people when social risk occurs.

The Constitutional court in such decisions has established certain very important principles.

First, the Constitutional court has provided the principle of socially responsible state. It has stated that:

*'The duty of the State to form a sustainable and balanced policy to ensure welfare of the society follows from the principle of a socially responsible state. Therefore the legislator has to elaborate such regulatory framework that would be aimed at sustainable development of the State'.<sup>49</sup>*

Second it has defined the obligations of the State in the field of social security rights as follows:

*'The Constitutional Court in its judgments repeatedly adjudicated the constitutional compliance of legal provisions pertaining to social rights, affirming that the State itself is responsible for the system of social and economic protection (types and amounts of allowances) and its maintenance. This system is dependent on the economic situation in the State and the available resources. Moreover, the State should be vested with wide-ranging freedom of action when deciding the matters of social rights'.<sup>50</sup>*

The Constitutional court has also defined its limits of competence when deciding cases regarding social security rights, in particular, that:

*'Character of the social rights also determines the boundaries of competence of the judicial power in respect to the particular domain. When realizing social rights the legislator enjoys an extensive freedom of action as far as it is reasonably connected with the economic situation of the State; however, this freedom of action is not unlimited [...]. Moreover, "the Judicial Power has the duty of assessing whether the legislator has observed the limits of the above freedom of action [...].'<sup>51</sup>*

The Constitutional Court in assessing if the state has fulfilled its positive duties in the field of fundamental social rights of the persons has to establish: 1) whether the legislator has performed any activities for realization of social rights; 2) whether the legislator has adequately realized the social rights, namely, whether persons had the possibility to exercise their rights at least at the minimum amount; 3) whether the legislator has not

<sup>49</sup> Decision in case No. 2011-03-01, 19 December 2011, paragraph 22.

<sup>50</sup> Decision in case No. 2009-43-01, paragraph 24.

<sup>51</sup> Decision in case No. 2011-03-01, 19 December 2011, paragraph 15.4.

violated general legal principles.<sup>52</sup> Further, when the court has to establish, if restriction of the rights provided by Article 109 corresponds to the Constitution, it has to investigate: 1) whether the restriction has been established by law or based on a law; 2) whether the restriction has a legitimate aim; 3) whether it complies with the principle of proportionality.<sup>53</sup> The same formula applies also to other norms of the Constitutions providing fundamental rights.

The cases decided by the Constitutional court in the field of social security rights may be divided in groups by the types of social security risks. The decisions usually deal with conditions under which the protection against social rights is provided.

One group of cases which was widely discussed was on the obligations of the state to cover the costs of medication, especially in cases where the medication is crucial for the survival and medication is very costly.<sup>54</sup> They were reviewed under Article 111. The Constitution the Constitutional court stated, first, that right to life under Article 93 of the Constitution and Article 2 of the ECHR is involved only as far it concerns cases where the threat to life is urgent and particular, second, that the obligation to ensure medication which is vital to the advanced life support may not be interpreted as equal to the urgent and particular threat to the life because no human rights document provides guarantees to a particular life expectancy and no state is able to provide the right to maximum possible life expectancy. The court in general recognized that neither Article 111 nor Article 110 (with regard to the children) requires provision of all necessary medical services free of charge. The state has an obligation to provide a medication free of charge only within the limits of available resources.<sup>55</sup> However the state has an obligation to find the most effective way of the use of available resources and provide the fair balance in distribution of the available resources with a view to provide accessibility to medical services to the wider circle of persons possible.<sup>56</sup> Thus in all cases regarding such matter the Constitutional court ruled that legal regulation on the state paid medication corresponds to Article 111 of the Constitution.<sup>57</sup>

Another group of cases concerns different kind of child-care allowances. They were reviewed under Article 110 which is usual case if the social rights concerns family or child related benefits.

The first 'child-care allowance' case was regarding the restriction to remain in active employment and to receive child-care allowance under social allowances scheme.<sup>58</sup> The court found that such a restriction does not correspond to the best interests of the family and the children, because the aim of the allowance is to assist to the family in case of birth of a child. However taking into account the low level of income in general many parents

<sup>52</sup> Decision in case No. 2011-03-01, 19 December 2011, paragraph 15.1.

<sup>53</sup> Decision in case No. 2011-03-01, 19 December 2011, paragraph 15.1.

<sup>54</sup> Decisions in cases No. 2009-12-03, 7 January 2010; No. 2012-26-03, 28 June 2013.

<sup>55</sup> Decision in case No. 2012-14-03, paragraph 1.2

<sup>56</sup> Decision in case No. 2009-12-03, 7 January 2010, paragraph 17.

<sup>57</sup> Decisions in cases No. 2009-12-03, 7 January 2010; No. 2012-14-03, 9 April 2013; No. 2012-26-03, 28 June 2013.

<sup>58</sup> Decision in case No. 2005-09-01, 4 November 2005.

are forced to remain in active employment in order to provide sufficient subsistence and refuse from social allowance.

The case was followed by another application which contested newly adopted regulation entitling parents who remain in active employment during child-care to receive 50% of allowance they would receive if they would be on full-time child-care leave.<sup>59</sup> The Constitutional court found that new regulation does not correspond to the principle of equality as far as it treats parents on part-time and full-time work and families with good income and families with low income equally.

In next claims numerous mothers contested the upper limit of the child-care allowance (LVL 392 or EUR 556).<sup>60</sup> The court found that definition of maximum limit of child-care allowance is not contrary to Article 110 (Article 91) of the Constitution, primarily because the allowance was paid under state social allowance scheme not social insurance system and because maximum amount of allowance several times exceeded official minimum subsistence allowance.

Further mothers of disabled children contested the norm entitling to disabled-child-care allowance (flat-rate social allowance) only parents out of active employment<sup>61</sup> and norm restricting the right to receive maternity allowance (statutory social insurance) and disabled-child care allowance simultaneously.<sup>62</sup> In both cases the court found that restrictions are unconstitutional because disabled-child care allowance is not aimed at the replacement of lost income from employment but at the accommodation of the special (additional) needs of the family with disabled child.

The next set of cases on child-care (parental) allowances followed on account of restrictions adopted on account of economic crisis.

The series of cases on child-care allowances were important because it demonstrated considerable rise of number of the constitutional claims submitted by the natural persons, in particular, the first child-care allowance case showed that the Constitutional court is accessible to everyone and that such institution indeed may help to improve the quality of the life of the society. It encouraged other parents what resulted in number of following claims regarding the system of award of child-care allowances.

There were two interesting decisions on the same matter where second was followed the first after more than 10 years<sup>63</sup> and where the court has changed its opinion. The cases were about the entitlement of the persons to social insurance benefits in case an employer has not factually made the contributions. The court in first case found such restriction as unconstitutional by stating that this is the state's obligation to collect statutory social insurance contributions and that employees factually lack any enforcement mechanisms against employers which do not factually provide contributions to the statutory social insurance budgets. However in second case regarding the norm restricting the right to receive old-age pension for only factually made social insurance contributions the court found that the state has provided sufficiently effective mechanisms for the collections of

<sup>59</sup> Decision in case No. 2006-07-01, 2 November 2006.

<sup>60</sup> Decision in case No. 2006-10-03, 11 December 2006.

<sup>61</sup> Decision in case No. 2006-08-01, 21 February 2007.

<sup>62</sup> Decision in case No. 2007-15-01, 12 February 2008.

<sup>63</sup> Decisions in cases No. 2000-08-0109, 13 March 2001, and No. 2011-03-01, 19 December 2011.

contributions and it has provided the persons with effective access to the information on factual contributions made by an employer.

The court however did not change its opinion in two cases followed each other within almost 9 years period<sup>64</sup> regarding the restriction on the right to receive full old-age pension for employed persons. Interesting that in principle in both cases the court used the same arguments although the restrictions were adopted in considerably different circumstances, i.e., the second one was adopted on account of severe economic crisis.<sup>65</sup>

#### 4. Threats to social security rights in time of economic crisis

The impact of economic crisis in Latvia was considerable.

*'The State budget revenues had been decreasing, unemployment growing, bringing about the increase of the social insurance special budget expenditures. In the second quarter of 2009 Latvia underwent the most rapid decline of economic activity in the European Union. So, for instance, the revenues of the State consolidated budget during the first six months of 2009 were for 15% lower than those of the corresponding time period in 2008. At the same time, the expenditures of the State consolidated budget during the first six months of 2009 were for 7.2% higher than those of the corresponding time period in 2008. The Gross Domestic Product drop in comparison to the first six months of 2008 was 18.7%. The drop persisted also in the third quarter of 2009, reaching 18.4% [...]. The prognosticated amount of the government's external debt for the second half of 2009 was approximately 33.2% from the Gross Domestic Product, and it has increased for approximately 70% since 2008 [...].*

*During this time, the financial deficit of the State consolidated budget reached 449.9 million lats or approximately 3.5% from the Gross Domestic Product, and the prognosis was that the deficit may reach 1.3 milliard lats or approximately 9.5% from the Gross Domestic Product by the end of 2009. As a consequence, both the performance of the functions of the State and the possibility of the economic activity renewal in the foreseeable future would be put in danger'.<sup>66</sup>*

The situation, i.e., budget cuts affected first of all social security rights. On 16 June 2009 the Parliament adopted the Law on pay-out of state pensions and state allowances for the period 2009–2012.<sup>67</sup> The Law envisaged many restrictions with regard to social security rights. The most considerable and contested ones were 10% cut of long-term service pensions, cut of old-age pension in amount of 70% and cut of parenting allowance in amount of 50% for persons in active employment. The law entered into force in two weeks after adoption – on 1 July 2009.

The Government and the Parliament the need for such law grounded on following considerations:

<sup>64</sup> Decisions in cases No. 2001–12–01, 19 March 2002, and No. 2009–43–01, 21 December 2009.

<sup>65</sup> See particularities of the issue in next section on implications of economic crisis.

<sup>66</sup> Decision in case No. 2009–43–01, 21 December 2009, paragraph 27.1.

<sup>67</sup> *Par valsts pensiju un valsts pabalstu izmaksu laika periodā no 2009.gada līdz 2012.gadam*, Official Gazette No. 100, 30 June 2009.

*'Concerning the need to balance the revenues and expenditures of the social security system, the Saeima indicated that, as a result of the economic crisis, wages had decreased and unemployment – increased. Consequently, the social insurance special budget revenues dropped. The number of socially insured persons has also decreased for 12.3%. It is also evident from the information furnished by the Ministry of Welfare that the actual expenditures of the social insurance special budget were for approximately 86 million lats higher than revenues during the first six months of 2009 [...]. At the same time, the rapid increase of wages during the preceding years has brought about the increase of the expenditures of the social insurance special budget. The budget in question is a constituent part of the State budget. It is prognosticated that its expenditures will exceed the revenues in the years 2009 and 2010, thus creating the budget deficit. In order to curb this tendency and to ensure further sustainability of the social insurance budget, the deficit had to be reduced'.<sup>68</sup>*

All the mentioned restrictions were contested before the Constitutional court. The most considerable public debate was about restriction for employed old-age pension recipients to receive pension in full amount and consequent case before the Constitutional court.<sup>69</sup> The court in this case started with reminding the following:

*'The Constitutional Court, interpreting the above article [Article 109], acknowledged that, on the one hand, the enactment of these fundamental rights depends on the resources at the disposal of the State and society; however, on the other hand, if any rights to social protection are included in the fundamental law, the State is not entitled to refuse the enactment of these rights. In this case these rights are not just declaratory, their protection has constitutional value in Latvia'.<sup>70</sup>*

Consequently the state has the right to restrict social security rights. However, the court continued, that the state in the situation of rapid economic regression has an obligation to provide the social rights only in a minimum level, i.e., in a way that the rights are not infringed in its substance, because *'the aim of these rights is to ensure life worthy of a human being'*. It found that the restriction has a legitimate aim – securing the sustainability of the social insurance budget by means of balancing its revenues and expenditures, thus ensuring the welfare of society. It also found that the means chosen are appropriate to attain the legitimate aim. Nevertheless the means chosen were not necessary to attain such aim. The court found that deficit in expenditure of social security budget occurred because of unreasoned political decisions, one of them – the decision to include new social insurance risk – parenting – without proper coverage in a form of additional social security contributions. The court also found that the restriction does not correspond to Article 1 of the Constitution or the general principles of law like principle of legal certainty on account of too short transitional period (two weeks) and equal treatment because not all recipients of old-age pension are in similar circumstances (with regard to the amount of old-age pension, other sources of income available and different amount of

<sup>68</sup> Decision in case No. 2009–43–01, 21 December 2009, paragraph 27.1.

<sup>69</sup> Decision in case No. 2009–43–01, 21 December 2009.

<sup>70</sup> Decision in case No. 2009–43–01, 21 December 2009, paragraph 24.

amount of income from decreased old-age pension and employment). Consequently the Constitutional court found that cut of old-age pensions in amount of 70% for recipients in active employment was contrary to Article 1 and 109 of the Constitution as from the moment of the adoption. The court took into account the difficulties the state budget may face in such a situation and gave the transitional period for pay-out of cut pensions until 1 March 2010. Interesting that in this case the Parliament and the Government put forward an argument that the restrictions were justified by the international obligations, i.e., by loan agreements concluded with European Community and International Monetary Fund which envisaged, among many other measures, cuts in social security allowances. The Constitutional court replied to that strictly, namely, that the international obligations undertaken by the state itself may not serve a valid argument for the restriction of social security rights guaranteed under Article 109 of the Constitution.

The court in the same case reviewed decrease of amount of long-term service pensions in amount of 10% and under the same argumentation found such restriction also as unconstitutional.

The Constitutional court afterwards reviewed few more cases regarding long-term service pensions for prosecutors, militaries and system of interior.<sup>71</sup> The substance in these cases was the same as in old-age pension restriction case. The only difference was that the contested norms were contained by special long-term service pensions' laws however their content was the same as norms of Law on pay-out of state pensions and state allowances for the period 2009–2012. In all cases the Constitutional court made the same findings as in case No. 2009–43–01.

The consequence of such decisions of the Constitutional court was adoption of the amendments by the Parliament envisaging other kind of restrictions of the social security rights which concerned almost all other social security risks.<sup>72</sup> They envisaged, in particular, that persons in case of maternity, paternity, parenting, accidents at work and illness are entitled to a daily social insurance allowance not exceeding amount of LVL 11.51 (EUR 16.37). In case statutory social insurance salary exceeds defined amount the persons were granted an allowance in amount of 50% from the sum exceeding LVL 11.51 (EUR 16.37).

The next most discussed case concerned the cut of parental allowances.<sup>73</sup> The parents contested the norm of the Law on pay-out of state pensions and state allowances for the period 2009–2012 providing the cut of parenting allowance in amount of 50% for parents in active employment. They contested the compliance of the restrictions with general principles of law, namely Article 91 – equal treatment and Article 1 – legal certainty. The court found that there was no breach of the principle of equal treatment because parents of small children in active employment are not in comparable situation with parents on parental leave. In former case the state has an obligation to provide the support for a family while in latter case the state has an obligation to replace the lost income from

<sup>71</sup> Decisions in cases No. 2009–76–01, 21 April 2010; No. 2009–86–01, 21 April 2010, No. 2009–88–01, 15 April 2010.

<sup>72</sup> Grozījumi likumā “Par valsts pensiju un valsts pabalstu izmaksu laika periodā no 2009.gada līdz 2012.gadam”, *official Gazette No. 200, 21 December 2009.*

<sup>73</sup> Decision in case no.2009–44–01, 15 March 2010.





makes considerable part of society in Latvia highly dependable on state support. Second, is the fact that usually social security system is regulated by series of complicated and very detailed legal acts which are closely and mutually connected. It means that any amendments to the legal acts regulating social rights must be elaborated very carefully not only taking into account available budgetary resources but also compliance with numerous general principles of laws like equality, legal certainty, proportionality etc. Third, the history demonstrates that pre-election periods result in populist amendments to social security laws with an aim to attract electorate. However such decisions are very frequently contrary to the interest of sustainability of the whole social security system.

In such a situation the role of the Constitutional court remains crucial in controlling the just, sustainable and reasonable distribution of the available public resources.

### Summary

In the Basic Law (“Grundgesetz”) – the German Constitution – a special and coherent catalogue of social human rights is not foreseen. Only a few social rights’ guarantees primarily as to women, mothers, children and handicapped persons are explicitly stipulated. Therefore, in the current German legal thought social human rights are regarded as neither fundamental, nor integral parts of human rights. As the full spectrum of human rights acknowledged in international law, among them above all the basic social human rights to work, education, health, accommodation, social security or social assistance (Articles 22–26 UDHR), does not correspond to the far more restricted catalogue of human rights explicitly figured out in the Basic Law as fundamental rights (“Grundrechte”), the doctrine argues even more that due to their very legal nature social human rights could not and never exist.

**Keywords:** Germany, social security rights, constitution